SUPREME COURT, U. S.

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In the

Supreme Court of the United States

OCTOBER TERM, 1968

No. 771

UNITED STATES EX REL. CHESTER ORSINI

vs.

FREDERICK REINCKE, WARDEN

On Appeal From United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT

ARNOLD MARKLE, Esq.,
State's Attorney,
RICHARD P. SPERANDEO, Esq.,
Assistant State's Attorney,
ROBERT K. WALSH,
Assistant State's Attorney,
Court House, 121 Elm Street,
New Haven, Connecticut 06510.

THE MACK CO., NORTH HAVEN, CONN.

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QUESTIONS PRESENTED

1. Does the court have jurisdiction to entertain a petition for certiorari filed after the time allowed?

2. Was the petitioner denied his right to speedy trial as guaranteed by the Sixth Amendment of the United States Constitution where a period of eleven months passed between

the date of his arrest and his trial and he neither objected at any time prior to trial to any delay, nor was prejudiced thereby?

3. Where one is arrested under an arrest warrant which is unsupported by oath or affirmation but is subsequently tried and convicted of the crime charged, does such warrant void the conviction and render it open to challenge in a habeas corpus proceeding?

STATEMENT OF FACTS

On November 13, 1964, a Superior Court bench warrant was issued for the arrest of the petitioner (defendant) charging him with the crime of aiding and abetting an abortion, in violation of Section 53-29 of the General Statutes of Connecticut. Said warrant was issued pursuant to Section 54-43 of the General Statutes of Connecticut without the support of an oath or affirmation.

On November 14, 1964, the defendant, accompanied by his privately retained attorney, Alan Soloman, went to the Bethany State Police Barracks and surrendered voluntarily to arrest. Bond was posted and the defendant released. On November 20, 1964, the defendant entered a plea of not guilty and elected a trial by jury of twelve. The defendant at the time of entering said plea, was still free on bail and in fact was free on bail at all times until his incarceration in the State Prison at Somers on September 26, 1967.

On October 26, 1965, the trial of the defendant commenced in the Superior Court in New Haven. Between the date of November 20, 1964, and the commencement of his trial on October 26, 1965, no motion for a speedy trial was filed by the defendant. On the day of trial Attorney Peter Zaccagnino first filed his appearance for the defendant. On that first day

of trial, the defendant filed a motion to dismiss the information on the ground that he had been denied the right to a speedy trial and also a motion to dismiss on the ground that the bench warrant was constitutionally invalid because it was issued without any supporting statement of probable cause. At no time prior to the first day of trial was a request made by the defendant or his counsel for a speedy trial or even that a trial date be set. After a full hearing on the above motions, both were denied.

The defendant's trial proceeded on October 26, 1965, and he was represented throughout by privately retained attorneys, Peter Zaccagnino and Alan Soloman. On the trial proper, the defendant chose not to testify, offered no evidence and was found guilty as charged on November 2, 1965. The defendant was sentenced on December 10, 1965, to a term of not less than one, nor more than four years in the Connecticut State Prison.

The defendant appealed his conviction to the Supreme Court of Connecticut which court upheld his conviction on July 13, 1967. *State* vs. *Orsini*, 232 A.2d 907; 155 Conn. 367 (1967). The defendant then filed a Motion to Re-argue to the Supreme Court of Connecticut on September 8, 1967, which was denied on September 20, 1967.

The defendant then moved the Supreme Court of Connecticut to Stay Execution of Sentence on September 22, 1967, and said motion was denied on September 25, 1967. The defendant commenced serving his sentence on September 26, 1967.

The defendant filed a petition for a writ of habeas corpus dated October 10, 1967, in the Superior Court for Tolland County which was heard at the State Prison at Somers, Connecticut, on October 26, 1967. After a full hearing said petition was denied on November 8, 1967.

Thereafter, a writ of habeas corpus dated December 7, 1967, was filed by the defendant in the United States District Court, District of Connecticut, and a Show Cause Order was issued by The Honorable M. Joseph Blumenfeld on December 20, 1967. (R. p. 8) After a full hearing before Judge Blumenfeld on January 8, 1968, said petition for writ of habeas corpus was denied on February 2, 1968. (Petitioner's Appendix A, R. p. 43)

Thereafter, on February 9, 1968, the defendant filed a notice of appeal to the United States Circuit Court of Appeals for the Second Circuit from the dismissal of his petition for writ of habeas corpus dated February 2, 1968. (R. p. 54) The Second Circuit Court affirmed the opinion of Judge Blumenfeld by Per Curium decision. (Petitioner's Appendix B, Record of Proceedings in United States Court of Appeals, 2nd Cir. p. 41)

On or about September 6, 1968, the petitioner filed an application for extension of time within which to file his petition for Writ of Certiorari. Said application was granted by The Honorable John M. Harlan, Justice of the Supreme Court of the United States, on September 9, 1968, and the petitioner was granted an extension of time to file the instant petition to November 21, 1968.

On September 25, 1968, the petitioner was released from the Connecticut State Prison on parole and remains so to date.

Thereafter, on November 25, 1968, the Petition for Writ of Certiorari was filed, the same being four (4) days after the time allowed by Justice Harlan.

ARGUMENT

I.

THE COURT LACKS JURISDICTION TO ENTERTAIN THE PETITION AS THE PETITION WAS FILED BEYOND THE TIME ALLOWED.

The petitioner made application to The Honorable John M. Harlan, Justice of the Supreme Court of the United States, on September 6, 1968, for an extension of time until November 22, 1968, within which to file the present petition. On September 9, 1968, Justice Harlan granted said application by extending the time for filing said petition until November 21, 1968. The petitioner failed to file his petition until November 25, 1968, however.

The respondent submits that this Court lacks jurisdiction over this petition, the petitioner having failed to file his petition within the time permitted by Justice Harlan.

28 U.S.C. Sec. 2101 (C);

FTC vs. *Colgate Palmolive Co.*, 380 U.S. 374, 85 S. Ct. 1035 (1965);

Bradford Electric Co. vs. *Clapper*, 284 U.S. 221 (1931).

II.

THE LOWER COURT DID NOT ERR IN DISMISSING THE APPELLANT'S HABEAS CORPUS PETITION ON THE GROUND THAT THE PETITIONER WAS DENIED THE RIGHT TO A SPEEDY TRIAL AS GUARANTEED BY THE SIXTH AMENDMENT.

Although eleven (11) months passed from the time that the petitioner pleaded not guilty, until the date of trial, respondent submits that the petitioner was not adversely affected in the prosecution of his defense.

Indeed, the petitioner presented no evidence in the Federal or State habeas corpus proceedings that the delay of eleven (11) months adversely affected the prosecution of his defense. At all times during said period he was represented by private counsel, on bail, and had ample opportunity to prepare his defense. Attorney Zaccagnino testified that the defendant knew what the charges against him were and that no motion for a bill of particulars was filed.

In the case of *United States* vs. *Holmes*, C.C.S. Pa. (1948) 168 F.2d 888, the court held that a period of three (3) years was not undue delay. In *United States* vs. *Fossoulis*, (1959) United States District Court, New York, 179 F. Supp. 645, it was held that a period of four (4) years between the time of arrest and the date of indictment was not undue in view of the fact that the defendant, as in this case, was on bail and made no demand for a speedy trial. In *Fossoulis*, the court followed the ruling set down by the United States Court of Appeals. (2nd Circuit) in *United States* vs. *Lustman*, 258 F.2d 475, *cert. denied* 358 U.S. 880, 79 S. Ct. 118, 3 L. Ed.2d, 109 where the court held that a defendant who has failed to demand a speedy trial is not entitled to a dismissal of the indictment no matter how great the delay. (See also *United States* vs. *Ewell*, 383 U. S. 116 and *United States* vs. *Sanchez*, 361 F.2d 824)

The Connecticut Supreme Court in its opinion written by Chief Justice King found that the appellant acquiesced in said delay and further stated, "Quite obviously this course was good trial strategy since the defendant was not being prejudiced by delay." (See *State* vs. *Orsini*, 155 Conn. 367 at p. 377)

Where the defendant fails to demand a speedy trial (57 A.L.R. 2d, 326 Sec. 10) or fails to object to delays in the prosecution of his case (57 A.L.R. 2d, 321 Sec. 9) he thereby waives his right to a speedy trial. This is the majority rule and fits the facts of this case squarely.

There is an abundance of other cases which might be cited involving delays far in excess of eleven months between arrest and trial, wherein the courts have held such delays, upon the facts of each case, did not constitute a denial of speedy trial. Appellee however, feels that the rationale of its position is best summed up by the reading of a portion of the opinion of the court in the *Lustman* case: —

> "The requirement of a demand leading to a trial on the merits when the defendant has not complained of the delay, 'stresses that the right to a speedy trial is not designed as a sword for defendant's escape, but rather as a shield for his protection'."

Lustman, supra, at page 478, citing in part, note the right to speedy trial, 57 Col. L. Rev. 846, 853 (1957).

The petitioner has printed as part of his appendix to his brief (Appendix A), Judge Blumenfeld's "Memorandum of Decision on Petition for Writ of Habeas Corpus" which memorandum succinctly sets forth the history of the Sixth Amendment with reference to the appellant's right to a speedy trial, and concludes that the appellant was not denied the right to a speedy trial. This conclusion is clearly warranted by the applicable law.

III.

The Fact That The Bench Warrant By Which The Defendant Was Arrested Was Not Supported By Oath Or Affirmation Did Not Render His Conviction Void For Lack Of Jurisdiction Over His Person.

It is conceded by the petitioner that he voluntarily surrendered to arrest by presenting himself at the State Police Barracks in November of 1964, and therefore respondent claims

that the petitioner thereby consented to jurisdiction over his person. (21 Am. Jur. 2d Criminal Law, Sec. 379) (See also *State* vs. *Orsini, supra*)

However, even if petitioner's arrest was illegal, (which is not conceded) that fact would not render his conviction void.

Respondent relies on *Frisbie* vs. *Collins*, 342 U.S. 519, 96 L.E. 541, 72 S. Ct. 509 (1952) in which case the defendant alleged that he had been living in Chicago, Illinois when Michigan officers forcibly seized, handcuffed, blackjacked and took him to Michigan where he was tried and convicted.

This court stated at page 522 as follows:

> "This Court has never departed from the rule announced in *Ker* vs. *Illinois*, 119 U. S. 436, 444, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.' No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will."

As indicated in Judge Blumenfeld's opinion, the petitioner's conviction was in fact not even based upon the arrest, and the "illegal" arrest by the police in this case raises no federal question. (See Memorandum of Decision on Petition for Writ of Habeas Corpus and cases cited — Petitioner's Appendix A p. 3a)

CONCLUSION

It is clear from a reading of Judge Blumenfeld's opinion rendered in this case and from the cases cited therein and cited in this brief, that the Superior Court for New Haven County at New Haven, had jurisdiction over the petitioner and that the present petition for a writ of certiorari should be denied, the petitioner having failed to set forth any valid reason why this court should grant the instant writ, and having filed the petition beyond the time allowed.

Respectfully submitted,

FREDERICK REINCKE, WARDEN,

By: ARNOLD MARKLE,
State's Attorney,
RICHARD P. SPERANDEO,
Assistant State's Attorney,
ROBERT K. WALSH,
Assistant State's Attorney.